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NO. 95-743
IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1995

FRANK PALERMO, *et al.*,
Petitioner

v.

CLAUDE E. WOODS,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF AMICI CURIAE STATES OF PENNSYLVANIA, ALASKA, COLORADO, DELAWARE, IDAHO, MARYLAND, MISSISSIPPI, NEVADA, NEW JERSEY, NORTH CAROLINA, OHIO, OKLAHOMA, VIRGINIA IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is favorable termination of the underlying prison disciplinary action against a state prison inmate an essential element of the inmate's Section 1983 retaliatory disciplinary report claim or is it merely one factor to be considered?

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INTEREST OF THE AMICI CURIAE

This brief in support of the Petition for Writ of Certiorari filed by prison officials of the Louisiana Department of Public Safety and Corrections is submitted on behalf of the Commonwealth of Pennsylvania and nine other States ("the Amici States") through their Attorneys General pursuant to Supreme Court Rule 37.5. The Amici States--which include Mississippi, a State with a large penal system and for whom the Fifth Circuit's ruling represents controlling law--have an important interest in this case because they are all responsible for defending, at substantial taxpayer expense, litigation commenced by prisoners incarcerated in the correctional facilities they operate. If left to stand and accepted by other courts, the Fifth Circuit's decision will hinder the speedy and efficient handling of this ever-increasing litigation, an increase that has imposed a double edged financial burden on the citizens of the Amici States. Not only have they had to defray the costs of defending the state officials sued, but they have also had to bear, on account of the taxes they pay to the United States, the costs of an expanding federal court system whose growth is attributable to the "deluge of prisoner suits." *See* Doumar, Robert G., *Prisoner Cases: Feeding the Monster in the Judicial Closet*, 14 St. Louis U.Pub.L.Rev. 21 (1994).

REASONS FOR GRANTING THE PETITION

IF ALLOWED TO STAND THE FIFTH CIRCUIT'S DECISION WILL SIGNIFICANTLY--AND NEGATIVELY--AFFECT THE EXPENDITURE OF STATE AND FEDERAL RESOURCES AND THE OPERATION OF THE FEDERAL COURTS.

1. The Court of Appeals for the Fifth Circuit has declined to require favorable termination of prison disciplinary proceedings as a prerequisite to a civil rights claim that a misconduct report has been issued to a prisoner in retaliation for the exercise of some protected conduct. The court acknowledged that "[t]he prospect of endless claims of retaliation on the part of inmates would disrupt prison officials in the discharge of their most basic duties" and that "claims of retaliation must therefore be regarded with some skepticism, lest federal courts embroil themselves in every disciplinary act that occurs in state penal institutions." Pet App. at 11 (quoting *Adams v. Rice*, 40 F.3d 72, 74 (4th Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1371 (1995)). Despite espousing these sound principles and stating that "mere conclusionary allegations" of retaliation would not withstand a summary judgment challenge, the court nonetheless went on to say that all an inmate need do to defeat summary judgment is to "allege a chronology of events from which retaliation may plausibly be inferred" and specifically declined to hold that even a legitimate prison disciplinary report is an absolute bar to a retaliation claim. *Id.* at ___. In so doing, the court not only runs afoul of its own guiding principles and the principles of this Court, it has issued a holding which, if widely accepted, will have a

deleterious effect on the efficient handling of prisoner litigation by the states and by the federal courts.

Unlike other types of civil litigation, civil rights cases by prisoners have flooded the federal courts over the last thirty years. *See* Doumar, *supra*, 14 St. Louis. U.Pub.L.Rev. at ___, (quoting reports of the Administrative Office of the U.S. Courts, that there were 33,018 prisoner civil rights cases filed in 1993 compared to 818 in 1967). There are more prisoner cases filed in the United States District Courts than any other type of civil case. Nationwide, the prisoner cases represent 23.25% of the civil docket of the United States District Courts and 28.62% of the dockets of the Courts of Appeals. *Id.* A substantial portion of those cases seek to dispute discipline administered to inmates. This Court repeatedly has stressed that the federal courts do not sit in *de novo* review of disciplinary actions, *see, e.g., Superintendent v. Hill*, 472 U.S. 445, 455-57 (1985), and that it is not the province of the federal courts to enmesh themselves in day-to-day prison administration by "second-guessing" the decisions of prison disciplinary personnel. (*Id.* at 455). Once again reminding that "the federal courts ought to afford appropriate deference and flexibility to state officials trying to manage a volatile environment," just last Term the Court held that the administration of routine discipline does not give rise to a liberty interest which engenders the protections of due process. *See Sandin v. Conner*, ___ U.S. ___, 115 S.Ct. 2293, 2299 (1995) (citing *Wolff v. McDonnell*, 418 U.S. 539, 561-563 (1974); *Hewitt v. Helms*, 459 U.S. 460, 470-71 (1981); *Jones v. North Carolina Prisoners Labor Union*, 433 U.S. 119, 125 (1977)). As a consequence of these decisions, claims by prisoners seeking to revisit the merits of disciplinary action typically are disposed of at the earliest stages of litigation with a comparatively minimal expenditure of resources by the defending States and the lower federal courts. Decisions like *Woods*, however, threaten this.

The Fifth Circuit's ruling in this case, if allowed to stand, and if widely accepted, will dramatically change the status quo and will undermine the salutary effects of the Court's decisions. Its decision effectively will permit a prisoner to circumvent these now well-settled principles by recasting his claim as one of retaliation, *i.e.*, that the discipline was issued in retaliation for his exercise of a constitutional right, and thereby to challenge the merits of the discipline. Under the Fifth Circuit's decision, a prisoner can accomplish this with nothing more than a bare assertion that there was a retaliatory motive for the disciplinary action.

Given that tens of thousands of disciplinary actions involving prisoners occur annually, the Fifth Circuit's ruling presents the potential for an enormous increase in discipline-related claims. Every disgruntled inmate could succeed in obtaining judicial review of disciplinary actions simply by adding an allegation in his complaint that he was the victim of retaliation. It is not unrealistic to expect that prisoners will avail themselves of this new avenue to placing their otherwise non-actionable claims before a federal court. To the contrary, "[p]risoners are notorious for bringing numerous . . . claims under 42 U.S.C. §1983." Levy, Tracey I., *Mandatory Disclosure: A Methodology for Reducing the Burden of* Pro Se *Prisoner Litigation*, 57 Alb.L.Rev. 487, 488 (1993) and the Chief Justice has observed that prisoner litigants have "a justified feeling that they have much to gain and virtually nothing to lose." *Cleavinger v. Saxner*, 474 U.S. 193, 211 (1985) (Rehnquist, C.J., dissenting). The existing liberal pleading standards applicable to these *pro se* litigants, moreover, aid in "abuse of the judicial process through the filing of claims in bad faith and for improper purposes." *Id.* at 504. "[M]any complaints are well worded by experienced jail-house lawyers who know what needs to be said to have their claim filed," *see*, Doumar, *supra*, 14 St. Louis. U.Pub.L.Rev. at ___. The upshot is that the states and their

taxpayers must shoulder the financial burdens imposed by these largely non-meritorious lawsuits.

The increased drain on resources of the States who will be obliged to defend these new claims, and of the courts which now must entertain them, can fairly be expected to be similarly substantial. In light of the potential impact that this decision likely will have on the States and the federal courts, the Amici States believe it is highly important that the Court address the question of whether the rule fashioned by the Fifth Circuit is sound. There is, we believe, serious reason to doubt that it is.

2. In failing to acknowledge that favorable termination of the underlying prison disciplinary proceedings is an essential element in any retaliation claim relating to inmate discipline, the Fifth Circuit has disregarded principles reiterated by this Court in its decisions in *Heck v. Humphrey*, ___ U.S. ___, 114 S.Ct. 2364, 2372-73 n.7 (1994); *Memphis Community School District v. Stachura*, 477 U.S. 209, 308 (1986); and *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 287 all of which require evidence of an actual, compensable injury for relief under Section 1983. In each of those cases, which involved different constitutional causes of action, the Court concluded that there was no actual, compensable injury for Section 1983 purposes unless the conduct being challenged was found to have been unjustified. *Heck*, 114 S.Ct. at 2372-73 n.7; *Stachura*, 477 U.S. at 308; *Mt. Healthy City*, 429 U.S. at 287. Before the states are exposed to a new burden of defending prisoner lawsuits in which no injury is at stake, the Court should grant the pending petition of the Louisiana prison officials to determine whether this is the law and settle any uncertainties occasioned by the Fifth Circuit's decision.

3. In addition to its other undesirable effects, the Fifth Circuit's ruling can lead to the second guessing by federal courts of basic and routine decisions concerning inmate discipline and security, a result the Court has consistently condemned. As early as *Procunier v. Martinez*, 416 U.S. 396 (1972), *overruled on other grounds, Thornburgh v. Abbott*, 490 U.S. 401 (1989), the Court acknowledged the considerable importance, in analyzing inmate claims of First Amendment violations, of giving appropriate weight to "government interests in . . . preservation of internal order and discipline, the maintenance of institutional security against escape or unauthorized entry, and the rehabilitation of the prisoners." *Id.* at 142, and in *Hewitt v. Helms*, *supra*, the Court, quoting *Bell v. Wolfish*, 441 U.S. 520, 527 (1979), adverted to the "wide ranging deference" accorded prison officials in policies and practices intended to preserve internal order and discipline in prisons. 459 U.S. at 472. In the context of streamlining procedural safeguards to administrative confinement, the Court observed that "an administrator's judgment would probably be hindered" *id.* at 474, n.7 by more trial-like procedures and that, "prison officials, wary of potential legal liability, might well spend their time mechanically complying with cumbersome, marginally helpful procedural requirements, rather than managing their institution wisely." *Ibid.* Yet, this is just the consequence the Fifth Circuit's decision invites. Those responsible for issuing prisoners misconducts for inappropriate or dangerous behavior may hesitate to do so because of concerns about potential liability in litigation which claims that the misconduct was "retaliatory." This apprehension would likely compromise the safe and orderly operation of prisons because prison officers could make decisions as simple and necessary as when to cite an inmate for misconduct based on factors other than their expertise and detached professional judgment.

CONCLUSION

For the foregoing reasons and those set forth in the Petition for Writ of Certiorari, the Petition should be granted.

Respectfully submitted,

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